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COURT OF CRIMINAL APPEALS
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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
3/3/2020
DEANA WILLIAMSON, CLERK

HARRY DONALD NICHOLSON, JR. Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Navarro County
Appellate Cause Number 10-18-00360-CR
Trial Cause Number D37996-CR

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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ORAL ARGUMENT
GRANTED

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Harry Nicholson, Jr.

* The trial judge was Hon. James Lagomarsino, Presiding Judge, 13th District Court, Navarro County, Texas.

* Counsel for Appellee at trial was Shana Stein Faulhaber, 115 W. Collin Street, Corsicana, Texas 75110.

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STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant posits that the only possible reading of § 38.04 legalizes fleeing from an officer the suspect knows is trying to arrest him as long as he is ignorant of whether his arrest is lawful. This Court, if it reaches the issue at all, should opt for the less dramatic version: the Legislature converted the exception for lawfulness of the arrest into an element and otherwise kept the law the same.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument has been granted.

STATEMENT OF THE CASE

Appellant was convicted of evading arrest or detention and aggravated assault on a public servant.[1] Both offenses were habitually enhanced, and he received concurrent sixty-year sentences.[2] Through a challenge to sufficiency and jury charge error, Appellant argued on appeal that evading requires the defendant to know his attempted arrest or detention was lawful.[3] A majority of the court of appeals sidestepped the issue, reversing for a different charge error and finding the evidence sufficient even if such knowledge were required.[4]

ISSUES GRANTED REVIEW

(1) Whether the plain language of the evading arrest statute requires proof of knowledge that the attempted arrest or detention is lawful.

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[1] CR 110; 13 RR 60-61.

[2] CR 120; 14 RR 68-70.

[3] App. COA Brief at 13-17, 24-26.

[4] *Nicholson v. State*, Nos. 10-18-00359-CR and 10-18-00360-CR, 2019 WL 4203673, at *1, 6 (Tex. App.—Waco, Sept. 4, 2019, pet. granted).

(2) Whether it matters in this case; whether the evidence is legally insufficient to show that Nicholson knew he was being lawfully detained.

STATEMENT OF FACTS

The offense and trial.

A gas-station cashier alerted police that Appellant had been sitting in his truck in the parking lot for several hours, throwing tissues out the window.[5] Officer Alexander Layfield responded and observed the litter amassed on the ground.[6] Layfield asked Appellant for his driver's license, but he didn't have it.[7] After gathering his information orally, the officer had dispatch check for warrants.[8] The warrant-return urged caution in approaching Appellant.[9] Dispatch immediately routed additional officers. Even before dispatch told him, Layfield understood the call for backup as an indication that Appellant was probably wanted.[10] In fact,

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[5] 12 RR 45, 48-49, 56-57, 77.

[6] 12 RR 66, 74-76.

[7] 12 RR 63, 80; SX 10 (Officer Layfield's body camera video at 22:22:40, 22:24:30).

[8] 12 RR 36.

[9] 12 RR 36-37.

[10] 12 RR 38-39, 63-64.

Appellant had at least two—for resisting arrest and evading.[11] Concerned that revealing police knowledge of the warrant over the radio could increase the risk to Layfield or prompt Appellant to flee, dispatch gave Layfield an opportunity to get out of earshot if he thought he needed to.[12] Layfield gave the go ahead while standing in the open door of Appellant's truck. Although difficult to make out over the sound of Appellant's engine, dispatch can be heard on Layfield's bodycam video saying "suspect," "active warrant," "evading arrest in a vehicle," "dangerous," and "flight risk."[13]

While awaiting backup, Officer Layfield had Appellant get out and throw away the tissues.[14] He then attempted to handcuff Appellant and explained that he needed to detain him "for right now," so they could talk, although Layfield did not say why.[15] Appellant asked for the officer to "give [him] a break" and pleaded for

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[11] 12 RR 36-37, 65; SX 2 & 3.

[12] 12 RR 42, 64-66, 80-82.

[13] SX 10 at 22:25:52 to 22:26:00.

[14] *Id*. at 22:27:30.

[15] 12 RR 81-82; SX 10 at 22:27:38.

no handcuffs.[16] Layfield insisted Appellant stay put and kept hold of Appellant's arm as Appellant moved back toward his truck, got in, started it, and began driving off, forcing Layfield to let go.[17] Seconds later, Appellant's truck struck another patrol car that was just arriving.[18] Officers ordered Appellant out of his truck and arrested him.[19] During an inventory of the truck, officers found three drug pipes in the center console.[20]

Appellant was indicted for aggravated assault and evading arrest or detention. Specifically, the evading indictment alleged that Appellant "while using a vehicle, intentionally fle[d] from Alexander Layfield, a person the defendant knew was a peace officer who was attempting lawfully to arrest or detain [him]."[21] At trial, the jury charge set out the following as elements:

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[16] SX 10 at 22:27:58.

[17] SX 10 at 22:28:20.

[18] 12 RR 68, 85, 105, 108, 111.

[19] 12 RR 112.

[20] 12 RR 135-36; SX 10 at 22:34:25 (officer begins search), 22:39:58 (mention of paraphernalia and one pipe put in envelope), 22:43:45 (two additional pipes found wrapped in a blanket).

[21] CR 17; 12 RR 17.

1. the defendant intentionally fled from a person;
2. the defendant knew the person he was fleeing from was a peace officer;
3. the officer was attempting lawfully to arrest or detain the defendant; and
4. the defendant used a vehicle while in flight.[22]

Appellant did not object to the jury charge.[23] He was convicted.

The intermediate court of appeals.

On appeal, Appellant argued the jury charge was wrong because it didn't require the defendant to know both that the officer was attempting to arrest or detain him and that his arrest or detention was lawful.[24] The majority of the court of appeals agreed that the first omission resulted in egregious harm and so didn't address the other issue; Appellant was already getting the new trial he sought.[25]

As for sufficiency, the majority held that, even if knowledge of lawfulness were required, the evidence established it.[26] It explained that ignorance of the law is

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[22] CR 106-07.

[23] 13 RR 8.

[24] 2019 WL 4203673, at *1-2.

[25] *Id*. at *1.

[26] *Id*. at *4.

no excuse and held the jury could infer Appellant "knew or should have known" he was subject to lawful arrest. It relied on the fact that he had warrants and committed several offenses: littering,[27] failure to present a driver's license,[28] and possession of drug paraphernalia.[29] Along the way, the majority observed that many cases rejecting a requirement of knowledge as to lawfulness had construed the evading statute when that was still an exception for the State to disprove.[30] Now, however, it is an element within a phrase that *Jackson v. State*[31] construed to require the defendant's knowledge.[32]

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[27] TEX. HEALTH & SAFETY CODE § 365.012(a) ("A person commits an offense if the person disposes . . . of litter . . . at a place that is not an approved solid waste site, including a place on or within 300 feet of a public highway...."); § 365.011(6)(B)(i) (including paper in definition of "litter"); § 365.011(8) (including roads and streets within the definition of "public highway").

[28] TEX. TRANSP. CODE § 521.052(a).

[29] *Id*. at *6; TEX. HEALTH & SAFETY CODE § 481.125(b) (intentionally or knowingly "possesses with intent to use drug paraphernalia . . . to . . . inhale, or otherwise introduce into the human body a controlled substance . . . .").

[30] *Nicholson*, 2019 WL 4203673, at *4 (citing *Hazkell v. State*, 616 S.W.2d 204 (Tex. Crim. App. 1981)).

[31] 718 S.W.2d 724 (Tex. Crim. App. 1986) (holding the defendant must know the officer was attempting an arrest).

[32] *Nicholson*, 2019 WL 4203673, at *4.

Chief Justice Gray, in dissent, believed that once the Legislature located the element of lawfulness within that phrase, the only "grammatically correct" and "logically consistent interpretation" is that knowledge is also required of the lawfulness element.[33] The chief justice also would have held the evidence insufficient to establish this.[34]

SUMMARY OF THE ARGUMENT

The majority was right. This is not the case to decide how to interpret § 38.04. Regardless of whether the State had to prove it, circumstantial evidence and Appellant's conduct was enough for a rational jury to conclude that Appellant overheard the warrant return or otherwise knew he had a warrant—and thus understood the validity of his arrest or detention.

Should the Court reach the issue, it should reject a radical, possibly absurd, interpretation that is out of step with the rest of the statute and its history.

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[33] *Nicholson*, 2019 WL 4203673, at *10 (Gray, C.J., dissenting) ("The Legislature simply added a third thing the State must prove the defendant knew.").

[34] *Id*. at *10-11.

ARGUMENT

Issue 1

> It is not plain that by inserting "lawfully" where it did the Legislature meant for a defendant's knowledge to extend to that element. The canons of construction favor a more limited interpretation that does not render evading ineffectual as an offense and deterrent.

The statute at issue.

> (a) A person commits an offense if he intentionally flees from a person he knows is a peace officer or federal special investigator attempting lawfully to arrest or detain him.

TEX. PENAL CODE § 38.04.

The plain language of the current statute is ambiguous.

Interpreting § 38.04 should begin with the current statute. "[A]ppellate courts are constrained to construe a statute that has been amended as if it had been originally enacted in its amended form, mindful that the Legislature, by amending the statute, may have altered or clarified the meaning of earlier provisions."[35]

Section 38.04 does not expressly say a defendant must know his attempted arrest or detention is lawful. As written, it is structurally ambiguous and syntactically

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[35] *Diruzzo v. State*, 581 S.W.3d 788, 803 (Tex. Crim. App. 2019) (quoting *Mahaffey v. State*, 316 S.W.3d 633, 642 (Tex. Crim. App. 2010)).

unusual. Structurally, the phrase "attempting lawfully to arrest or detain him" could modify "officer" and "investigator" or "person."[36] The phrase "[who] he knows is a peace officer or federal investigator" could be a restrictive clause into itself, and if so, there would be no requirement of knowledge regarding the lawfulness of the arrest or detention (or the attempted arrest or detention).[37] Also, even if the phrase modifies "officer" and "investigator," it is not clear that the required knowledge extends to lawfulness. It might be clearer if the word "lawfully" appeared before "attempting"—*i.e.*, "intentionally flees from a person he knows is a peace officer or federal special investigator lawfully attempting to arrest or detain him." But instead of the usual syntax, the word "lawfully" interrupts "attempt," a transitive verb, and

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[36] It could also theoretically modify just "investigator," and set out two offenses: (1) intentionally fleeing from a person he knows is a peace officer; and (2) intentionally fleeing from a federal special investigator attempting lawfully to arrest or detain him. But given the parallel structure of "peace officer or federal special investigator," this is not grammatically consistent or reasonable. *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, at 152 (2012) ("When the syntax involves something *other than a parallel series of nouns or verbs*, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent.") (emphasis added).

[37] The intentional mental state preceding "flees" cannot be read to modify the phrase "attempting lawfully to arrest or detain him" because this is likely a circumstance of the offense, which cannot as a matter of logic or statute, be intended. TEX. PENAL CODE § 6.03(a); *Jackson*, 718 S.W.2d at 727 (Clinton, J., concurring).

its direct object "to arrest or detain." This bucks convention.[38] Its placement favors treating it as parenthetic information (formally known as a parenthesis), rather than within the elements that a defendant has to know. Although a parenthesis is typically set off by punctuation, it does not have to be.[39]

Applying the canons of construction, a sensible rather than radical interpretation should prevail.

Although this Court is tasked with interpreting the current statute, the court of appeals and Appellant are not wrong to consider *Jackson v. State*'s construction that the mental state of knowledge applies not only that it is a peace officer the defendant

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[38] *See* "2. Where Do Adverbs Go?: Seven Rules on Placement," Grammar.com. (available at https://www.grammar.com/2-where-do-adverbs-go/). Some examples of separating the verb from its object are clearly wrong:

> The boy rolled gently the ball to his classmate.
> He contacted immediately his client about the plea offer.
> The court of appeals issued swiftly its opinion in the high-profile case.
> The jury reached unanimously its verdict that the defendant was guilty.

Others are not wrong, but the syntax is noticeable (and presumably purposeful):

> You should convey accurately the words the victim used.
> The attorney defended vigorously his client's right to testify.

[39] "Parenthesis," Merriam-Webster Online Dictionary ("an amplifying . . . or explanatory word, phrase, or sentence inserted in a passage from which it is usually set off by punctuation") (available at https://www.merriam-webster.com/dictionary/parenthesis).

flees from but also that the officer is "attempting to arrest him." "When that construction is longstanding, there is some force to the argument that, if the Legislature did not agree with the judicial interpretation, it would have acted to change the statute."[40] The question is whether to interpret the Legislature as having adopted *Jackson*'s construction or changed it. Adoption is the better interpretation.

The statute's brief history.[41]

Evading was adopted as part of the 1974 Penal Code.[42] Unlike resisting arrest and escape, evading has always permitted non-violent self-help if an officer's actions are unlawful.[43] Originally, it did so as an exception, meaning the State had to allege

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[40] *Jones v. State*, 323 S.W.3d 885, 888 (Tex. Crim. App. 2010).

[41] This is different than the legislative history of a bill, which *Boykin v. State*, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991), holds is an extra-textual factor. *See* Scalia and Garner, READING LAW, at 256 (explaining that statutory history "form[s] part of the context of the statute, and (unlike legislative history) can properly be presumed to have been before all the members of the legislature when they voted.").

[42] Act of 1973, 63rd Leg., R.S., ch. 399, § 1 (S.B. 34) (eff. Jan. 1, 1974).

[43] Physical force has always been prohibited. *See* TEX. PENAL CODE § 38.03(b) ("It is no defense to prosecution under this section that the arrest or search was unlawful."); TEX. PENAL CODE § 9.31 (limiting use of force to resist a search or seizure "even though the arrest or search is unlawful"); *see State v. Mayorga*, 901 S.W.2d 943, 945 (Tex. Crim. App. 1995) (explaining resisting arrest's rejection of the common law right to the use of self-help to resist an unlawful arrest) (quoting *Barnett v. State*, 615 S.W.2d 220, 223 (Tex. Crim. App. 1981), and *Ford v. State*, 538 S.W.2d 633, 635 (Tex. Crim. App. 1976)).

and prove the attempted arrest was not unlawful.[44] In its first case construing the statute, this Court determined that evading's purpose was "to deter flight from arrest by the threat of an additional penalty, thus discouraging forceful conflicts between the police and suspects."[45]

Two years later, under the statute as originally enacted, *Hazkell v. State* rejected an implicit mental state concerning lawfulness.[46] Hazkell argued that evading should be treated like Failure to Stop and Render Aid, which had a mental state that an accident had occurred implied under § 6.02(b).[47] *Hazkell* rejected the comparison:

> In the case before us, the pleading and proof must show that the "attempted arrest was lawful." The fact that an unlawful arrest is an exception which must be pled and proved does not carry with it the

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[44] TEX. PENAL CODE § 2.02(b). The State's burden was frequently phrased without the double negative: "the state must allege and prove the attempted arrest lawful." *Alejos v. State*, 555 S.W.2d 444, 448 (Tex. Crim. App. 1979) (op. on reh'g) (citing Searcy & Patterson, "Practice Commentary," TEX. PENAL CODE ANN. § 38.04 (1974)). But there could be a difference. "Unlawful" means something that is criminal or tortious. TEX. PENAL CODE § 1.07(a)(48). "Lawfully" is not defined but in practice has been treated as incorporating probable cause and reasonable suspicion.

[45] *Alejos*, 555 S.W.2d at 449 (finding fleeing and evading were not *in pari materia*).

[46] 616 S.W.2d 204, 205 (Tex. Crim. App. 1981).

[47] *Id.* at 205 (Tex. Crim. App. 1981) (citing *Goss v. State*, 582 S.W.2d 782 (Tex. Crim. App. 1979)).

> responsibility for the State to allege and prove that the accused "knew" he did not come within the exception.[48]

In 1986, the Court in *Jackson* required knowledge that the officer was attempting to arrest the defendant.[49] Before echoing the court of appeals that this interpretation was "clear and unambiguous," it relied on the fact that avoidance of an arrest was the gravamen of the offense.[50]

The following year, the Court held that an attempted arrest did not include a *Terry v. Ohio* temporary detention.[51] The next legislative session, the Legislature amended the statute to criminalize evading a detention.[52]

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[48] *Id.*

[49] *Jackson*, 718 S.W.2d at 726. This was before the addition of "federal special investigator" (Act of 2011, 82nd Leg., R.S., ch. 839, § 2 (H.B. 3423), eff. Sept. 1, 2011).

[50] *Jackson*, 718 S.W.2d at 726; *see also Riggs v. State*, 482 S.W.3d 270, 275 (Tex. App.—Waco 2015, pet. ref'd) ("the act of fleeing becomes criminal only because of the actor's knowledge that a peace officer is attempting lawfully to arrest or detain the actor.").

[51] *Smith v. State*, 739 S.W.2d 848 (Tex. Crim. App. 1987).

[52] Act of 1989, 71st Leg., R.S., ch. 126, § 1 (S.B. 916) (eff. Sept. 1, 1989). Between the 1974 Penal Code and this amendment, there was one other amendment. The Legislature added a presumption of recklessness for the Class A enhancement for placing an officer in imminent danger of serious bodily injury.

Then in 1993, as part of the re-enactment of the Penal Code, the Legislature made the following amendments:

> (a) A person commits an offense if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest [~~him~~] or detain him [~~for the purpose of questioning or investigating possible criminal activity~~].
>
> (b) [~~It is an exception to the application of this section that the attempted arrest is unlawful or the detention is without reasonable suspicion to investigate~~.][53]

The last of the substantive amendments to the offense elements occurred in 2011, when the Legislature added "or federal special investigator" after the phrase "[who] he knows is a peace officer."[54]

The 1993 Amendment adopted *Jackson*'s construction.

Before the 1993 amendments, this Court held that a defendant must know the officer is attempting to arrest him, but not that his attempted arrest was legal. The best interpretation is that the amendment changed neither holding. The adoption of the *Jackson* construction is more obvious. Re-enactment after judicial construction

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[53] Act of 1993, 73rd Leg., R.S., ch. 900 (S.B. 1067).

[54] Act of 2011, 82nd Leg., R.S., ch. 839, § 2 (H.B. 3423) (eff. Sept. 1, 2011).

generally shows approval.[55] And here, the Legislature maintained all the original words that *Jackson* construed: "intentionally flees from a person he knows is a peace officer attempting . . . to arrest . . . him." It is theoretically possible that, by adding the word "lawfully" into the phrase (an element that had been construed not to have a mental state applied to it), the Legislature intended to reject the application of knowledge to both the lawfulness and the attempted arrest. But there are far more straightforward ways of effectuating that intent.

As for knowledge not extending to lawfulness, it is less clear whether a change was intended because the amendment changed the language that *Haskell* interpreted. Citing Scalia and Garner, Appellant argues that such changes are "presumed to entail a change in meaning."[56] Two other canons override that presumption. First, this Court should be reluctant to interpret an amendment as affecting a dramatic change, particularly when a less radical interpretation is just as, if not more, likely.[57] And,

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[55] *State v. Colyandro*, 233 S.W.3d 870, 881 (Tex. Crim. App. 2007); *Moore v. State*, 868 S.W.2d 787, 790 (Tex. Crim. App. 1993); *see also State v. Medrano*, 67 S.W.3d 892, 902 (Tex. Crim. App. 2002) (finding "considerably less force (though still some)" when the legislature fails to immediately change a statute after judicial construction).

[56] App. Brief at 12; Scalia and Garner, at 256.

[57] *See Sanchez v. State*, 23 S.W.3d 30, 38 (Tex. Crim. App. 2000) ("absent a clear indication in the legislative history that the Legislature intended a dramatic change in

relatedly, "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."[58]

Appellant's radical, possibly even absurd, construction should be rejected in favor of one that doesn't render evading largely ineffectual as an offense and deterrent.

The construction Appellant advances is a radical one that should be rejected because it renders the statute ineffectual.[59] "Arrest" and "detain" are terms of art with an enormous body of law devoted to when they may lawfully be carried out. With rare exception, knowing one's attempted arrest or detention is lawful will require familiarity with this specialized knowledge base. It will likely require a working knowledge of legal standards like reasonable suspicion and probable cause, Fourth Amendment exceptions, authorizations for warrantless arrests and jurisdictional requirements in Chapter 14 of the Code of Criminal Procedure, and

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unanimous verdict requirements for the offense of murder, we should be reluctant to infer from an ambiguous textual basis that the Legislature desired such a change.").

[58] Scalia and Garner, READING LAW, at 63. This canon applies to all kinds of texts, not just statutes.

[59] It is presumed that in enacting a statute that "a result feasible of execution" is intended. TEX. GOV'T CODE § 311.021.

when an officer can use force.[60] In most instances, defendants will have no basis for such knowledge and prosecutors will have no way to prove they know it. Appellant's interpretation asks the State to prove the defendant knew something that we don't ordinarily ask instructed jurors to decide.[61]

In the instant case, for example, Appellant argues that despite the legal authority of officers to perform a full custodial arrest of Appellant for Class C misdemeanors like littering and failing to produce his driver's license,[62] the State did not prove he was aware of this authority. This perversely rewards ignorance and is at odds with the usual rule that ignorance of the law is no excuse. Legislators,

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[60] *See, e.g.*, *Blackmon v. State*, 644 S.W.2d 738, 741 (Tex. Crim. App. 1983), *overruled on other grounds by Smith v. State*, 739 S.W.2d 848 (Tex. Crim. App. 1987) (holding jury charge with abstract instruction on warrantless arrests under Article 14.03's suspicious places "properly applied the law of arrest to the facts of the case."). It may require knowledge of how these legal principles would play out in the defendant's particular circumstances. *See Ross v. State*, 543 S.W.3d 227, 235 (Tex. Crim. App. 2018) (insufficient evidence to prove that CPS investigator who received Fourth Amendment training knew her conduct in searching items inside kitchen was "unlawful."); *Reynolds v. State*, 543 S.W.3d 235, 242 (Tex. Crim. App. 2018) (insufficient evidence to prove Fourth-Amendment-trained employee knew her conduct in confiscating juvenile's phone was "unlawful.").

[61] *Medford v. State*, 13 S.W.3d 769, 772 (Tex. Crim. App. 2000).

[62] *Atwater v. City of Lago Vista*, 532 U.S. 318, 340 (2001); TEX. TRANSP. CODE § 543.004 (permitting custodial arrest for traffic offenses other than speeding, open container, and texting while driving).

lawyers, judges, and better-informed citizens would not have an avenue of defense available that the less-informed would.

In addition, because lawfulness frequently turns on the facts that officers base their decisions on, a defendant will often need to know that, too. This is also not easily proven. Although the suspect may be privy to some of the situational facts, officers can still lawfully act based on what other people tell them and what police collectively know.[63] In some instances, revealing what officers know may burn a confidential source. Conveying this information has never been constitutionally required, and officers would not even be bound to that basis.[64] Also, as was the concern in this case, revealing the basis for arrest or detention can increase the risk to officers.[65] In other instances, it would encourage, not dissuade, the commission

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[63] *State v. Martinez*, 569 S.W.3d 621, 628 (Tex. Crim. App. 2019).

[64] *Devenpeck v. Alford*, 543 U.S. 146, 152, 155 (2004); *see* TEX. PENAL CODE § 9.51(b) (only non-peace officers are generally required to provide reason for arrest before using force to effect it, but even then provision is made for when the reason "cannot reasonably be made known to the person to be arrested.").

[65] "The danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty…" *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973). Of the 259 officers feloniously killed in the U.S. between 2014 and 2018, 37 died while attempting an arrest, 27 died during a pursuit of a suspect, and 75 died during an investigation of a suspicious person or activity, a traffic stop, or handling a wanted person. FBI, Uniform Crime Reports, 2018 (available online at

of evading.

Further, knowledge of lawfulness isn't a reasonable person standard. A defendant can flee with impunity even if every other person would know the attempted arrest is lawful, but he unreasonably does not. Most instances of evading develop very quickly, providing officers little opportunity to observe or collect circumstantial evidence of a defendant's subjective knowledge.[66] In short, except for extreme cases (like flight after the existence of an arrest warrant has been revealed or the suspect has committed a violent crime in the officer's presence), the State will be unable to prove most cases of evading. Such an interpretation goes against re-enacting the evading statute, the undoubted purpose of which is to penalize such behavior.[67]

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https://ucr.fbi.gov/leoka/2018/topic-pages/tables/table-25.xls). Assaults are also frequent during attempted arrests, accounting for 16.5% of all assaults on officers in 2018. *Id*. (available online at https://ucr.fbi.gov/leoka/2018/topic-pages/officers-assaulted).

[66] Putting the burden on the State to prove what the defendant knows runs counter to the usual rule that it should fall on the party that "has superior access to the evidence needed to prove the fact" and "'on whom it would sit lightest.'" Charles A Wright, "Policy Background; Burdens of Proof," 21B FED. PRAC. & PROC. EVID. § 5122 (2d ed.) (quoting Jeremy Bentham).

[67] *Alejos*, 555 S.W.2d at 448 (citing Searcy & Patterson, "Practice Commentary," TEX. PENAL CODE ANN. § 38.04: "If flight from arrest can be deterred by the threat of an additional penalty, there should be fewer instances in which peace officers resort to force

Finally, this knowledge-by-the-suspect requirement clashes with, and at times undermines, Fourth Amendment doctrine. The law has repeatedly rejected the idea that an officer's subjective awareness should matter.[68] This is in part because the law cares about lawful conduct of its government actors, and evidence should not be excluded when there has been no "objectively ascertainable" violation of the law.[69] Appellant's interpretation of the statute would go further than exclusion of evidence, since it would result in no conviction at all, even when officers had acted entirely within the law. Fourth Amendment law carefully considers incentives for proper law enforcement conduct, the cost of the penalty of exclusion of probative evidence, and achieving the right balance between these. An officer's reasonable mistake of law or fact, for example, can properly be considered as part of a decision to arrest or detain a suspect.[70] But a defendant who did not know this was the law can essentially unwork that legal principle. Elevating a defendant's subjective belief in lawfulness

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to effect an arrest.").

[68] *Whren v. United States*, 517 U.S. 806, 810 (1996); *Ohio v. Robinette*, 519 U.S. 33, 37 (1996); *Garcia v. State*, 827 S.W.2d 937, 943 (Tex. Crim. App. 1992).

[69] *Garcia*, 827 S.W.2d at 944.

[70] *Heien v. North Carolina*, 574 U.S. 54, 61 (2014).

over actual lawfulness upsets the careful balance of Fourth Amendment law, and further, would seem to undermine the importance that the Legislature has repeatedly given to making sure that, for the offense of evading, an officer's conduct is lawful.

For the same reasons, and because the Legislature "could not possibly have intended" this result,[71] this Court could also reject Appellant's interpretation as absurd.[72]

The better interpretation is a narrow one.

The more sensible and narrow interpretation of the 1993 amendment is that it merely eliminated an unnecessary and sometimes troublesome exception.[73]

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[71] *Boykin*, 818 S.W.2d at 785.

[72] *See Lovington v. State*, No. 07-16-00109-CR, 2016 WL 7321792, at *2 (Tex. App.—Amarillo Dec. 13, 2016, no pet.) (not designated for publication) ("It is nonsensical to suggest that an accused may avoid conviction simply because he can unilaterally analyze the situation and conclude (irrespective of any education in the law or 4th Amendment jurisprudence) that the peace officer had no basis to detain him. And, we opt not to construe § 38.04(a) in such an absurdist way.").

[73] *See, e.g., Garcia v. State*, 649 S.W.2d 163, 164 (Tex. App.—Austin 1983, no pet.) (reversing conviction and dismissing evading indictment for failing to plead the exception); *see generally Mueller v. State*, 735 S.W.2d 269, 270 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd) (holding indictment that failed to allege exception was void and court was without jurisdiction). In 1993, it was still an open question whether the 1985 changes to pleading law made an indictment no longer void if it failed to plead exceptions. *Martinez v. State*, 879 S.W.2d 54, 56 n.4 (Tex. Crim. App. 1994).

Lawfulness was already an element by virtue of the definition of "element" in Penal Code § 1.07(a)(22). And inserting it as a parenthetical or aside would continue the construction given in *Haskell*—that no implied mental state applies to lawfulness.

Appellant points out that "lawfully" is not set off by any punctuation to indicate it is separate from the rest of the phrase,[74] but this is not crucial. The Legislature itself instructs that "Punctuation of a law does not control or affect legislative intent in enacting the law."[75]

For so radical a departure, nothing in the legislative history supports Appellant's interpretation.

Should this Court find that how "lawfully" functions in the statute is ambiguous, the legislative history of the 1993 amendment affirms the State's narrower interpretation. The same Senate Bill changed numerous exceptions to affirmative defenses or defenses. These included the exception for appearances incident to probation or parole in Bail Jumping and Failure to Appear, former Penal Code § 38.10(b); Obscenity's law enforcement purpose exception (former § 43.23(g)); and non-applicability provisions of UCW (former § 46.02(b)).

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[74] *See* App. Brief at 12.

[75] TEX. GOV'T CODE § 312.012(b).

Decidedly missing from the legislative history is any indication of the radical change Appellant alleges they made. The bill analysis provides the following description of the amendments to evading:

> Provides that detention of a person must be lawful in order for an offense to be committed. Deletes existing subsections (b) and (c), and deletes existing language authorizing an offense under this section to be a Class A misdemeanor if certain conditions are met.[76]

Supporters of the bill suggest it would generally:

> streamline the Penal Code to make it more effective . . . CSSB 1067 goes back to the code of 1973, removing enhancements that do not fit the general punishment scheme, reconciling individual penalties with the overall scheme, addressing statutory changes necessitated or suggested by appellate court decisions . . . . Nothing in CSSB 1067 would legalize anything that previously was illegal; most of what the bill would eliminate already is addressed more effectively and with greater force of law by other statutes.[77]

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[76] Senate Research Center, Bill Analysis, Aug. 11, 1993 (S.B. 1067, Enrolled) (available online at https://lrl.texas.gov/LASDOCS/73R/SB1067/SB1067_73R.pdf#page=4370). The introduced version, which still had the exception intact and added "lawfully" immediately before "detain him," contains this note: "(a-b) Provides that detention of a person must be lawful in order for an offense to be committed." Senate Research Center, Bill Analysis, Apr. 14, 1993 (S.B. 1067, As Filed) (whole bill file p. 4330) (available online at https://lrl.texas.gov/LASDOCS/73R/SB1067/SB1067_73R.pdf#page=4330).

[77] House Research Organization, Bill Analysis, p. 19 (May 6, 1993) (available online at https://lrl.texas.gov/scanned/hroBillAnalyses/73-0/SB1067.pdf).

Given how radically Appellant's interpretation would change prosecution of evading cases, someone would have said something—in favor or against—even in a bill as vast as the 1993 Penal Code re-enactment.

Issue 2

> Although it will not usually be the case, the evidence is sufficient here to infer that Appellant's knew his arrest or detention was lawful because of a warrant.

Appellant knew he was wanted.

The jury could have inferred Appellant's knowledge of the lawfulness of his detention or arrest based on a series of reasonable inferences from the evidence.[78] Contrary to Appellant's contention,[79] there was evidence Appellant knew he was wanted. One of the warrants (a capias) was introduced in evidence and lists the charge as "EVADING ARREST DET W/VEH" from Van Zandt County.[80] It shows Appellant was on bond for that offense and missed a court appearance, leading to the issuance of the capias.[81] Further, the address on the capias is the same as what Appellant gave to Officer Layfield and said was current,[82] supporting the reasonable

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[78] *See Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007) (permitting inference stacking under *Jackson v. Virginia*, 443 U.S. 307 (1979)).

[79] App. Brief at 16.

[80] 16 RR 6 (State's Exhibit 2)

[81] 16 RR 6-7 (State's Exhibits 2 & 3).

[82] *Cf*. SX 2 (capias) *with* SX 10 at 22:23:19 & 22:25:10.

inference that Appellant likely was given the opportunity to know of his appearance date and that he understood the significance that his absence could lead to a warrant being issued. In a jail-call recording before his trial on the evading charge underlying this appeal, Appellant made an adoptive admission[83] indicating he knew he was wanted on the Van Zandt evading. Appellant's mother told him, "If you'd have just gone to the courthouse up there in Van Zandt and gotten that over with, you wouldn't be in this situation."[84] Appellant responded, "I would have been in jail."[85] More than that, Appellant had at least two active warrants for his arrest, further strengthening the inference that he knew he was wanted.

Appellant knew the officer knew he was wanted.

Since the jury could hear dispatch say "active warrant," "evading arrest in a vehicle," and "dangerous," they could infer Appellant also overheard this and understood it referred to him. Moreover, even without this evidence, it isn't a great leap to infer that someone who knows he has a warrant and who has provided his

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[83] TEX. R. EVID. 801(e)(2)(B).

[84] State's Exhibit 31 (file labeled 201711121325_008191_9038517679_41 at 2:15).

[85] *Id.*

name, driver's license number, and birthdate to a police officer who then relays that information to dispatch also knows that police will discover it. Appellant's attempts to dissuade the officer from handcuffing him and then ultimately fleeing when that seemed not to be working are consistent with someone who knows he's good for it. Appellant confirmed as much in his call to his mother informing her of his arrest: "I told you . . . I wasn't gonna go [to jail] if I didn't have to, and I tried to get away."[86]

Additionally, as the court of appeals recognized, Appellant knew he had been littering and failed to present his driver's license to the officer on request.[87] His possible ignorance that the law has criminalized this conduct should not excuse him in this context any more than it would in any other. Also, he obviously knew the officer had not written a citation or given him a warning for these offenses, underscoring his awareness that the officer was justified in asking him to stay put.

Because the evidence is sufficient for a rational jury to conclude Appellant knew his arrest or detention was lawful, this Court should affirm the decision of the court of appeals.

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[86] State's Exhibit 31 (file labeled 201711101007_008191_9038517679_42 at 2:09).

[87] *Nicholson*, 2019 WL 4203673, at *6. Appellant is correct that the paraphernalia possession was unknown to police at the time he fled and should not be factored into sufficiency.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals affirm the court of appeals and the trial court's judgment and sentence for evading.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 5,759 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ Emily Johnson-Liu
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 28th day of February 2020, the State's Brief on the Merits was served electronically on the parties below.

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